U.S. Department of Labor

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Issue Date: 12 June 2007

Case No.: 2006-BLA-05401

In the Matter of

C.M.
Claimant

v.

DC COAL COMPANY
Employer

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Helen M. Koschoff, Esquire
For Claimant

Daniel A. Miscavage, Esquire
For Director

Before: ROBERT D. KAPLAN
Administrative Law Judge

DECISION AND ORDER
AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.[1]

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a disease of the lungs resulting from coal dust inhalation.

[1] The regulations cited are the amended regulations, effective January 19, 2001, found at 20 C.F.R. Parts 718 and 725 (2001), except where otherwise indicated.

On February 13, 2006, this case was referred to the Office of Administrative Law Judges for a formal hearing. Subsequently, the case was assigned to Administrative Law Judge Paul H. Teitler who held a hearing in Reading, Pennsylvania, on August 29, 2006, where the parties had full opportunity to present evidence and argument. Judge Teitler died on May 10, 2007, without issuing a decision in the case. On May 30, 2007, I issued an Order advising the parties that the case was reassigned to me and allowing an opportunity to file an objection to my issuing a decision based on the existing record. The parties have advised they have no objection to my issuing a decision based on the existing record, as well as my consideration of Claimant's certificate of death (ALJX 1) that was received post-hearing.[2] ALJX 1 is received in evidence herewith. Neither Claimant nor Employer filed a post-hearing brief.

The decision that follows is based upon an analysis of the record, the arguments of the parties and the applicable law.

I. ISSUES

Claimant and Employer stipulated that Claimant established he has a coal mine employment history totaling 13 years. I find the record supports this stipulation. The following issues are presented for adjudication:[3]

1. Whether Claimant has pneumoconiosis.

2. Whether Claimant's pneumoconiosis arose out of his coal mine employment.

3. Whether Claimant is totally disabled.

4. Whether Claimant's total disability is due to pneumoconiosis.

5. Whether Claimant has established a change in a condition of entitlement pursuant to § 725.309(d).

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[2] The following abbreviations are used herein: "DX" refers to Director's Exhibit; "CX" refers to Claimant's Exhibit; "EX" refers to Employer's Exhibit; "ALJX" refers to Administrative Law Judge's Exhibit; "T" refers to the transcript of the August 29, 2006, hearing.

Judge Teitler referred to five Employer exhibits. (T at 5) However, I find six Employer exhibits in the record, which I have numbered EX 1 through EX 6. These will be identified as they are reviewed below.

[3] The form CM-1025 (DX 41) indicates that Employer controverted various issues with respect to its status as the responsible operator. However, no such issues were referred to in Employer's pre-hearing statement under "Controverted Issues." Further, at the hearing Employer did not raise any question with regard to its status as the responsible operator. Consequently, I find that Employer has waived this issue. Finally, Employer did not provide the District Director with evidence showing that it is not the responsible operator. § 725.408(b). Consequently, I find this issue has been waived by Employer.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Background

Claimant filed his initial claim on July 11, 1991. The District Director denied the claim on January 3, 1992, based on the findings that Claimant failed to establish the presence of pneumoconiosis or that he was totally disabled due to a respiratory or pulmonary condition. Claimant then filed a request for a formal hearing. The case was assigned to Administrative Law Judge Ainsworth Brown. However, Claimant then requested withdrawal of the claim, and Judge Brown granted Claimant's motion and dismissed the claim on July 14, 1994. (DX 1)

Claimant filed the current claim for benefits on August 16, 2004. (DX 3) On November 18, 2005, the District Director issued a final denial of the claim. (DX 36) On November 21, 2005, Claimant requested a formal hearing. As noted above, a hearing was held before Judge Teitler on August 29, 2006. (DX 38)

B. Factual Background

Claimant was born on September 22, 1942. He married L.L. on May 8, 1965, and she is his only dependent for purposes of augmentation of benefits. (DX 3; T 9) Claimant died on October 24, 2006. (ALJX 1)

Claimant testified that he worked in underground coal mining, drilling and loading coal, timbering, and helping transport coal. Claimant stated that in this work he had to lift up to 175 pounds, and climb. (T 10) Claimant stated that he ceased working in coal mine employment in 1991. (DX 3)

Claimant testified that he had difficulty breathing and had to stop to catch his breath when he walked. He stated he could not return to his coal mine employment due to the breathing problem. Claimant had a cough and had difficulty sleeping due to his breathing condition. Claimant was treated by Dr. Kraynak starting about a year and a half prior to the hearing. He took Albuterol medication and used an inhaler for his breathing problem. Claimant stated that in October 2005 he underwent surgery to replace a heart valve. He said he had no subsequent heart problem. (T 11-14) Claimant testified that he began smoking cigarettes about age 17, but ten years before the hearing had quit smoking for a period of five years. (T 15-16)

C. Entitlement

Because this claim was filed after the effective date of the Part 718 regulations, Claimant's entitlement to benefits will be evaluated under Part 718 standards. § 718.2. In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) he suffered from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) Claimant was totally disabled prior to his death, and (4) his total disability was caused by pneumoconiosis. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

The record contains a prior claim filed in 1991 that was denied by the District Director on January 3, 1992, because Claimant had failed to establish either the presence of pneumoconiosis or total disability. Therefore, this subsequent claim must be denied unless Claimant demonstrates that one of these applicable conditions of entitlement has changed since the denial of the prior claim. § 725.309(d). Section 725.309(d) also provides that the following rules shall apply in adjudicating subsequent claims:

> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
>
> (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, . . . if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
>
> (3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.
>
> (4) If claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim.

§ 725.309(d).

D. The Current Medical Evidence

The post-January 3, 1992 medical evidence is set forth below.

The record contains the following current X-ray interpretations:[4]

[4] In his Order issued on March 6, 2007, Judge Teitler excluded from the record Dr. Ciotola's interpretation of an X-rated taken on May 23, 2006. (EX 1)

DATE OF X-RAY	DATE READ	EX. NO.	PHYSICIAN	RADIOLOGICAL CREDENTIALS[5]	I.L.O. CLASS
10/21/04	10/21/04	DX 15	Dr. Zacher	BCR	Negative
10/21/04	6/9/06	CX 3	Dr. Miller	BCR, B	1/1
10/21/04	5/18/06	CX4	Dr. Capiello	BCR, B	2/1
10/21/04	5/30/06	CX 5	Dr. Ahmed	BCR, B	1/2

The October 21, 2004, film was read by Dr. Barrett for quality, as "Q1." (DX 16)

The current record contains the pulmonary function studies ("PFT") summarized below.[6]

DATE	EX. NO.	PHYSICIAN	AGE	FEV_1	FVC	MVV	FEV_1/FVC	EFFORT	QUALIFIES
10/21/04	DX 14	Dr. Mariglio	62	1.76 1.23*	2.58 2.44*	82 66*	68% 66%*	Good Good*	No Yes*
5/10/06	CX 1	Dr. Kraynak	63	1.71 1.84*	2.07 2.10*	60 60*	82% 87%*	Good Good*	Yes No*
6/15/06	CX 2	Bloomsberg Hospital	63	1.51	1.80	42	84%	Unstated[7]	Yes

*post-bronchodilator

Claimant's height was most frequently reported as 67 inches. I have used that height in determining whether the PFTs qualify to establish total disability. Protopappas v. Director, OWCP, 6 B.L.R. 1-221 (1983).

The current record contains the arterial blood gas studies ("ABG") summarized below.

DATE	EX. NO.	PHYSICIAN	PCO2	PO2	QUALIFIES
10/21/04	DX 13	Dr. Mariglio	37 38*	80 81*	No No*
5/23/06	EX 4	Dr. Dittman	28	78	No

*post-exercise

[5] A B-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. § 37.51 A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206(b)(2)(iii) (2001).

[6] In his Order issued on March 6, 2007, Judge Teitler excluded from the record the PFT performed on May 23, 2006 under the aegis of Dr. Dittman. (EX 2)

[7] The report notes: "Patient states best efforts."

The current record contains the opinions of Drs. Mariglio, Kraynak, Nassef, Dittman, and Bermudiz.

Dr. Mariglio (Board certified in internal medicine, pulmonary disease and critical care medicine) reexamined Claimant on December 9, 2004, and issued a report on that date. (DX 11) Dr. Mariglio noted that Claimant had a kidney transplant operation in 1993, coronary artery bypass surgery in 1994, and had severe neuropathy of the hands and feet. However, the physician noted that Claimant's extremities were normal in appearance. The physician remarked that Claimant's general appearance was "debilitated" and that he had smoked ½ to one pack of cigarettes daily for 17 years, but had quit smoking for the past 10 years. Dr. Mariglio discussed Claimant's symptoms of hemoptysis, orthopnea, and nocturnal dyspnea. Based on Dr. Zacher's negative interpretation of the October 14, 2004 X-ray, and the PFT, ABG, EKG and clinical examination on that date, Claimant's symptoms and coal mine employment history, Dr. Mariglio opined that Claimant did not have pneumoconiosis and was not totally disabled due to a pulmonary or respiratory condition, but had mild obstructive airways disease. The physician stated that Claimant's dyspnea was due to valvular heart disease, coronary artery disease with angina, and COPD due to continued cigarette smoking.

Dr. Louis Nassef (qualifications not of record) issued a four-line report dated June 19, 2006 in which he stated he had examined Claimant. (CX 6) The physician remarked that Claimant had chronic lung disease due to "black lung" caused by occupational exposure. He referred to an unidentified chest X-ray and unexplained "clinical assessment."

Dr. Raymond Kraynak (Board eligible in family medicine) issued a report dated June 20, 2006, in which he stated he had evaluated Claimant on May 10. 2006. (CX 7) Dr. Kraynak referred to Claimant's symptoms of dyspnea, productive cough, and shortness of breath, as well as his history of kidney transplant, aortic valve replacement, coronary artery bypass surgery, neuropathy, and smoking cigarettes for 30 years until 2004. The physician noted that Claimant was credited with a coal mine employment history of 13 years. Dr. Kraynak also referred to the PFT of June 15, 2006 and a positive interpretation of a 1993 X-ray. Positive clinical findings were increased A-P diameters and scattered wheezes in all lung fields. Dr. Kraynak opined that Claimant has pneumoconiosis arising out of his coal mine employment and is totally disabled due to pneumoconiosis. Dr. Kraynak was deposed on July 14, 2006, at which time he reiterated the statements in his report of June 20, 2006. (CX 7) In addition, Dr. Kraynak testified that prior to his appointment with Claimant on May 10, 2006, he had seen Claimant in 1992 and then "lost track of him." Claimant also had a "follow-up visit after" May 10, 2006 with the physician. (Depo at 8, 10) Dr. Kraynak referred to the PFT of May 10, 2006, and stated that the lack of reversibility in that study would diminish smoking as an etiology of Claimant's shortness of breath. (Depo at 11) Dr. Kraynak discussed Dr. Mariglio's report, a PFT of January 21, 2004 (which is not of record), the PFT performed at a Hazleton hospital (which is not of record), the X-ray interpretations in the current record, the ABG of May 23, 2006, and Dr. Dittman's report (discussed below). (Depo at 12-16) The physician considered a smoking history of 20 pack-years at ½ to one pack per day, and stated that the PFTs did not show reversibility but would show some reversibility if smoking was a primary cause of Claimant's respiratory impairment. He also noted that chest X-rays show no emphysematous changes that would be expected if smoking were a significant factor. Dr. Kraynak opined that Claimant's smoking history caused

mild obstructive pulmonary disease, but that the PFTs indicate his defect is primarily restrictive. The physician stated that Claimant's heart is in good condition. (Depo at 19-25)

Dr. Thomas Dittman (qualifications not of record) saw Claimant on March 3, 2006 and issued a report dated March 14, 2006 (EX 5). Dr. Dittman noted Claimant's respiratory symptoms, including dyspnea on walking 200 feet on level ground or climbing seven steps, and wheezing. The physician noted the kidney transplant and aortic valve replacement. He reported a smoking history of 45 years, from age 17 to age 62. The report is smudged and illegible where the physician states the quantity of cigarettes Claimant smoked. However, it appears that it was never more than one pack per day based on the legible portion of the statement. Clinical findings included normal chest without wheezes, rhonchi or rales, and grade 2 systolic murmur. Dr. Dittman's conclusions included that Claimant "may have obstructive lung disease based on his years of cigarette smoking [and] may have coal workers' pneumoconiosis [and] his cardiac condition may contribute to or be the primary cause for his dyspnea." The physician added that if Claimant has pneumoconiosis it arose of his coal mine employment. Dr. Dittman recommended PFTs and a chest X-ray. (EX 5 at 4) The physician appended a "Physical Capabilities Form" in which he stated, inter alia, that in an eight-hour work day, Claimant could sit for eight hours and stand for four hours, but no time was set down for walking; Claimant could lift and carry up to ten pounds frequently, and up to twenty-five pounds occasionally; Claimant could bend occasionally, climb not at all, crawl occasionally, kneel occasionally, squat occasionally, and reach without restriction. The physician opined that Claimant could engage in sedentary work without restriction, light work part-time, but could not perform medium or heavy work. Dr. Dittman issued a report dated June 15, 2006, in which he discussed the PFT and ABG studies performed on that date under his aegis, as well as the negative interpretation of the X-ray taken on that date. (As noted above, in his Order of March 6, 2006, Judge Teitler excluded this PFT and the X-ray interpretation.) Dr. Dittman stated that the ABG demonstrates normal oxygenation. The physician also stated:

> The information from these diagnostic studies . . . indicate to me that [Claimant] does not have coal workers' pneumoconiosis and is not physically impaired nor disabled on the basis of pneumoconiosis.

The record contains a certificate of death for Claimant, who died on October 24, 2006, signed by Dr. Maria Bermudiz (ALJX 1). The physician stated that death was due to acute respiratory failure, atypical pneumonia, chronic immunosupression, and black lung–pneumoconiosis. The record contains no other statement by Dr. Bermudiz.

E. Elements of Entitlement

1. Presence of Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at § 718.202(a)(1) through (a)(4):

(1) X-ray evidence. § 718.202(a)(1).

(2) Biopsy or autopsy evidence. § 718.202(a)(2).

(3) Regulatory presumptions. § 718.202(a)(3).

a) § 718.304 - Irrebutable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.

b) § 718.305 - Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment.

c) § 718.306 - Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971.

(4) Physician's opinions based upon objective medical evidence § 718.202(a)(4).

The Third Circuit has held that, in considering whether the presence of pneumoconiosis has been established, "all types of relevant evidence must be weighed together to determine whether the claimant suffers from the disease." Penn Allegheny Coal Co. v. Williams, 114 F.3d 22, 25 (3d Cir. 1997).[8]

X-ray evidence, § 718.202(a)(1)

Under § 718.202(a)(1), the existence of pneumoconiosis can be established by chest X-rays conducted and classified in accordance with § 718.102. The current record contains four interpretations of the X-ray taken on October 21, 2004. Three of the four interpretations are positive for pneumoconiosis. Consequently, I find this X-ray is positive for pneumoconiosis, and the current X-ray evidence supports a finding of the presence of pneumoconiosis.

Biopsy or autopsy evidence, § 718.202(a)(2)

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). That method is unavailable here, because the current record contains no such evidence.

[8] This case arises in the U.S. Court of Appeals for the Third Circuit because Claimant's coal mine employment took place in Pennsylvania.

Regulatory presumptions, § 718.202(a)(3)

A determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§ 718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy or equivalent evidence of complicated pneumoconiosis which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. § 718.305(e). Section 718.306 is only applicable in the case of a deceased miner who died before March 1, 1978. Since none of these presumptions is applicable, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

Physicians' opinions, § 718.202(a)(4)

The fourth way to establish the existence of pneumoconiosis under § 718.202 is set forth as follows in subparagraph (a)(4):

> A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Section 718.201(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" and "includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis." Section 718.201(a)(1) and (2) defines clinical pneumoconiosis and legal pneumoconiosis. Section 718.201(b) states:

> [A] disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

An opinion is well-documented and reasoned when it is based on evidence such as physical examinations, symptoms, and other adequate data that support the physician's conclusions. See Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987); Hess v. Clinchfield Coal Co., 7 B.L.R. 1-295 (1984). A medical opinion that is undocumented or unreasoned may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989); see also Duke v. Director, OWCP, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how the underlying documentation supports his or her diagnosis). A medical opinion is adequately documented if it is based on items such as a physical examination and an accurate smoking history and report of coal mine employment. See Perry v. Director, OWCP, 9 B.L.R.1-1 (1986).

Dr. Mariglio opined that Claimant did not have pneumoconiosis. In arriving at that opinion the physician placed substantial reliance on the negative interpretation of the chest X-ray taken on October 21, 2004. However, I have found that this X-ray is positive for pneumoconiosis, based on the three positive interpretations by well-qualified radiologists. Accordingly, I find that this opinion of Dr. Mariglio is not documented or reasoned, and it entitled to no weight.

Dr. Nassef opined that Claimant had "black lung" caused by his exposure to dust in his coal mine employment. However, the physician provided no basis for his opinion. I therefore find that the opinion of Dr. Nassef is not documented or reasoned and is entitled to no weight.

Dr. Kraynak stated the opinion that Claimant had pneumoconiosis. He relied on positive X-ray interpretations Claimant's coal mine employment history, symptoms, and clinical findings, as well as laboratory studies. Although some of the laboratory studies to which the physician referred are not in the record, his primary bases for diagnosing pneumoconiosis were the positive X-ray interpretations and Claimant's coal mine employment history, symptoms and positive clinical findings. I therefore find that the opinion of Dr. Kraynak that Claimant had pneumoconiosis is reasoned and documented.

Dr. Dittman stated the opinion that Claimant did not have pneumoconiosis. He relied primarily on the negative interpretation of an X-ray taken on June 15, 2006. However, as noted above, Judge Teitler excluded from the record the interpretation of the June 15, 2006 X-ray. In addition, in his Order dated March 6, 2007, Judge Teitler rejected Claimant's motion to strike Dr. Dittman's reports, but stated that "the weight to be given to evidence that references such excluded tests shall be adjusted accordingly." I find that Judge Teitler's ruling is correct, and therefore I shall not consider Dr. Dittman's opinions that are based primarily on the two excluded reports. Further, Dr. Dittman did not consider the positive X-ray taken on October 21, 2004. Accordingly, I find that the opinion of Dr. Dittman that Claimant did not have pneumoconiosis is not reasoned or documented and is entitled to no weight.

The opinion of Dr. Bermudiz that pneumoconiosis contributed to Claimant's death is unexplained by the physician. Consequently, this opinion is not reasoned or documented, and is entitled to no weight.

Considering all the current evidence together, I find that the positive X-ray evidence and Dr. Kraynak's opinion that Claimant had pneumoconiosis are sufficient to establish the presence of pneumoconiosis. § 718.202(a)(1) – (4).

2. Pneumoconiosis Arising Out of Coal Mine Employment

The regulations provide that a miner who was employed for at least ten years in coal mine employment is entitled to a rebuttable presumption that pneumoconiosis arose out of coal mine employment. § 718.203(b). However, where a miner has established less than ten years of coal mine employment history, "it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship." § 718.203(c).

Claimant had a coal mine employment history exceeding ten years, and is therefore entitled to the rebuttable presumption. Although Claimant had a significant smoking history, no physician has stated the opinion that Claimant's pneumoconiosis was caused by smoking or by anything other than his exposure to coal dust in his coal mine employment. I therefore find that the presumption in § 718.203(b) has not been rebutted.

3. Total Disability

Claimant must establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) provides as follows:

> [A] miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner
>
> (i) From performing his or her usual coal mine work; and
> (ii) From engaging in gainful employment . . . in a mine or mines . . .

§ 718.204(b)(1).

Nonpulmonary and nonrespiratory conditions which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" have no bearing on total disability under the Act. § 718.204(a); see also, Beatty v. Danri Corp., 16 B.L.R. 1-1 (1991), aff'd as Beatty v. Danri Corp. & Triangle Enterprises, 49 F.3d 993 (3d Cir. 1995).

Claimant may establish total disability in one of four ways: pulmonary function study; arterial blood gas study; evidence of cor pulmonale with right-sided congestive heart failure; or reasoned medical opinion. § 718.204(b)(2)(i)-iv). Producing evidence under one of these four ways will create a presumption of total disability only in the absence of contrary evidence of greater weight. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986). All medical evidence relevant to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. Rafferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987).

The three PFTs in the current record all contain one study that qualifies to establish total disability under the regulations. In addition, even the non-qualifying studies resulted in low FEV-1 values. Finally, no physician has stated that any of these PFTs is invalid. I therefore find that this evidence supports a finding that Claimant was totally disabled prior to his death. § 718.204(b)(2)(i).

The current blood gas studies did not yield qualifying results. Based on the foregoing, Claimant has not established total disability under the provisions of § 718.204(b)(2)(ii).

Under § 718.204(b)(2)(iii), total disability can also be established where the miner had pneumoconiosis and the medical evidence shows that he suffers from cor pulmonale with right-

sided congestive heart failure. There is no record evidence of cor pulmonale with right-sided congestive heart failure.

The remaining means of establishing total disability is with the reasoned medical judgment of a physician that Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful work. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. § 718.204(b)(2)(iv).

The current record contains the medical opinions discussed above.

Neither Dr. Nassef nor Dr. Bermudiz stated an opinion regarding whether Claimant was totally disabled prior to his death.

Dr. Kraynak opined that Claimant was totally disabled based on the latter's symptoms, clinical findings, and PFTs. Although Dr. Kraynak relied on several PFTs that are not of record, the PFTs in the record on which he also relied are supportive of a finding of total disability. Further, although the two current ABGs do not qualify to establish total disability, PFTs and ABGs measure different physiologic functions. Based on the foregoing, I find that the opinion of Dr. Kraynak that Claimant was totally disabled is reasoned and documented.

Dr. Dittman opined, on the basis of his conclusions regarding Claimant's functional limitations, that Claimant was able to perform work of a sedentary nature without restriction or work of a light nature part-time, but not medium or heavy work. Dr. Dittman also stated that Claimant was not impaired or disabled due to pneumoconiosis. However, it is not clear whether these findings were based on the physician's conclusions regarding Claimant's pulmonary/respiratory impairment or his other medical conditions. In addition, Dr. Dittman appears to have placed substantial reliance on his excluded PFT. I therefore find that the opinion of Dr. Dittman – whatever it may be regarding whether Claimant is totally disabled – is not reasoned or documented.

Based on the above, I find that the current medical opinion evidence supports a finding that Claimant is totally disabled. § 718.204(b)(2)(iv).

As previously noted, the PFTs and the physicians' opinion evidence support a finding that Claimant is totally disabled. I therefore find that the current medical evidence as a whole establishes that Claimant was totally disabled. § 718.204(b)(2)(i) – (iv).

4. Total Disability Due to Pneumoconiosis

Claimant must establish that he is totally disabled due to pneumoconiosis. This element of entitlement is established if pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. § 718.204(c)(1); Bonessa v. United States Steel Corp., 884 F.2d 726 (3d Cir. 1989). The regulations provide that

> Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

§ 718.204(c)(1). Finally, the regulations provide that Claimant can establish this element of entitlement by a physician's documented and reasoned medical report. § 718.204(c)(2).

Dr. Kraynak concluded that Claimant's smoking history contributed to his pulmonary impairment, while opining that pneumoconiosis was a substantial contributor to Claimant's total disability. I find that this opinion of Dr. Kraynak is reasoned.[9] Dr. Dittman did not state a clear opinion about whether Claimant was totally disabled or, if so, whether or not pneumoconiosis was a substantial contributor to the disability. In sum, no physician clearly disagreed with the opinion of Dr. Kraynak. Consequently, I find that Claimant has established that his total disability was due to pneumoconiosis. § 718.204(c).

F. Conclusion

As Claimant has established by the current evidence that he had pneumoconiosis arising out of coal mine employment and he was totally disabled due to pneumoconiosis, he has established a change in conditions subsequent to the denial of the prior claim, pursuant to § 725.309(d). Thus, the entire record must be considered at this juncture. However, the medical evidence pre-dating the denial of the prior claim on January 3, 1992, is now more than 15 years out of date. I therefore find that the pre-1992 evidence is not relevant to Claimant's medical condition at the time he filed the current claim on August 16, 2004, and thereafter.

In light of the foregoing, I find that all the relevant evidence of record establishes that Claimant is totally disabled due to pneumoconiosis arising out of his coal mine employment. Claimant is therefore entitled to benefits under the Act.

III. COMMENCEMENT OF BENEFITS

Section 725.503(b) of the regulations provides that benefits are payable to a miner beginning with the month of onset of disability due to pneumoconiosis arising out of coal mine employment. However, where the evidence does not establish the month of onset, benefits shall

[9] I find that Dr. Kraynak was not Claimant's "treating physician" under § 718.104(d) because he had seen Claimant only several times in the recent period prior to the July 2006 deposition. Consequently, Dr. Kraynak's opinions are not entitled to controlling weight under that regulation.

be payable beginning with the month during which the claim was filed. As the prior claim is no longer viable, in the latter circumstance the date of the current claim would be the effective date.

The record in the instant case does not establish the month of onset of total disability. Consequently, benefits shall commence as of August 2004, the month in which the current claim was filed.

ATTORNEY FEE

No award of attorney's fee for services to Claimant is made herein because no fee application has been received. Thirty (30) days is hereby allowed Claimant's counsel for the submission of a fee application which must conform to subsections 725.365 and 725.366 of the regulations. A service sheet showing that service has been made upon all parties including Claimant must accompany the application. Parties have ten (10) days following receipt of any such application within which to file any objection. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The claim of C.M. for benefits under the Act is AWARDED. Benefits shall be augmented based on Claimant's spouse and shall commence as of August 2004.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).